IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OSCAR W. EGERVARY	:	
	:	CIVIL ACTION
v.	:	No. 96-3039
FREDERICK P. ROONEY, ESQ., et al.	:	

O'Neill, J. August , 2000

M E M O R A N D U M

This case arises out of an international child custody dispute. Plaintiff alleges that defendants violated his due process rights by removing his son from his custody and returning the child to Hungary after a Hague Convention/ICARA hearing of which plaintiff was given no notice or opportunity to be heard. On January 21, 2000, I denied defendants' motion for summary judgment. See Egervary v. Rooney, 80 F. Supp.2d 491 (E.D. Pa. 2000) ("Egervary I"). At that time, I concluded that plaintiff's due process rights were violated and ordered the parties to brief whether summary judgment should be entered in plaintiff's favor on the question of liability on the Bivens count. Id. at 510. For the reasons stated below, I will enter summary judgment in favor of defendant Nallin on the Bivens count and will not enter summary judgment in favor of plaintiff.

BACKGROUND

As was described at greater length in Egervary I, on May 13, 1994, defendants Frederick P. Rooney, Esq., James J. Burke, Esq., and Jeffrey C. Nallin, Esq. filed a Hague

Convention/ICARA petition in the U.S. District Court for the Middle District of Pennsylvania.[1] Id. at 495. The petition alleged that plaintiff Egervary had abducted his son Oscar from Hungary and was unlawfully retaining him in this country against the wishes of his mother, Aniko Kovacs. Id. The petition was heard by the Honorable William J. Nealon and was granted after an ex parte hearing. Id. Egervary was given no notice of or opportunity to be heard in those proceedings. Id. That same day, members of the Pennsylvania State Police and the U.S. Marshals arrived at Egervary's residence, removed Oscar from his custody, and delivered the boy to defendant Rooney who immediately returned the child to Ms. Kovacs in Hungary. Id. at 494. Egervary alleges that he had not abducted his son, but rather that his wife had taken the boy to Hungary under false pretenses, hid the boy from his father once he was there, and was illegally retaining him there when Egervary retrieved him in December 1993. Id. at 493-94. He further claims that during the period when he was searching for his son, he consulted with the American Embassy in Budapest and was told that if he could find Oscar he was free to take the boy back to the United States. Id. Egervary also alleges that defendants misrepresented material issues of law and fact to Judge Nealon in the ICARA hearing. Id. at 495 n.3.

In arguing against the entry of summary judgment, defendants rely on evidence that was not presented in Egervary I regarding the events leading up to the seizure of plaintiff's son. Defendants' involvement in this case began with a referral from Ginny Young and James Schuler of the State Department on May 10, 1994:

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[1] The Hague Convention on the Civil Aspects of International Child Abduction is a multilateral international treaty on parental kidnaping adopted by the United States and other nations in 1980. The International Child Abduction Remedies Act, 42 U.S.C. § 11601 et seq. ("ICARA") is the Hague Convention's implementing legislation. See Egervary I, 80 F. Supp.2d at 494-95, 499-501.

> The case I hope you will be able to accept is that of an almost-two-year-old child, Oscar Egervary, who, according to the information we have, was quite brutally kidnaped by his father and brought to the U.S. The mother, your client-to-be, is a violin soloist in Budapest and the father in the U.S. is unemployed, so I'm sorry but it doesn't look like there's any money anywhere.
>
> The child was born in the U.S. but the family apparently decided to go back home, and apparently the father gave up job [sic] and belongings to relocate. And then seems to have changed his mind. I figure the Hague applies in that the child lived a month or two longer in Hungary than he did in the U.S. and the information seems to indicate that Hungary had been established as the place of residence when the father did the kidnaping.[2]

See Young Ltr. of May 10, 1994 (Plaintiff's Ex. A). See also Rooney Interrogatories (Nallin's Ex. E) ¶ 6. Rooney also claims that Schuler told him the child could be ordered returned to Hungary after an ex parte hearing. Id. ¶ 22.

On May 12, 1994, Rooney's associate, defendant Burke, contacted defendant Nallin and asked him to serve as local counsel to Rooney and Burke in the ICARA proceedings. See Nallin Dep. at 10-11. Burke and Nallin were friends and had been roommates "out of law school." Id. Nallin agreed to act as local counsel and authorized Rooney to "sign [his] name to the Pleadings" in the Egervary matter. See Nallin Ltr. of May 12, 1994 (Nallin's Ex. C).

The next day, Nallin met Rooney and Burke at the courthouse, signed the petition, and

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[2] According to Mr. Egervary's sworn testimony in these proceedings, virtually all of this information is wrong. See Egervary I, 80 F. Supp.2d at 493-94. I note that Young and Schuler were parties to this case until August 1998 when the Honorable Sue L. Robinson of the U.S. District Court in Delaware, to whom the case was then assigned, entered summary judgment on their behalf. Id. at 497. I do not question her disposition of their motion; however, if Rooney's claim that the State Department suggested Oscar could be returned to Hungary after an ex parte hearing is correct, then Young and Schuler bear a great deal of responsibility for the violation of Mr. Egervary's constitutional rights, even if they cannot be held accountable in these proceedings. It is a matter of some concern that representatives of the State Department may have advocated the removal of an American citizen from this country without notice or opportunity to be heard based upon unsworn hearsay and statements such as "I figure the Hague applies" and "information seems to indicate."

moved for their admission pro hac vice. See Nallin Dep. at 16, 19, 22. Nallin read and signed the petition and accompanying verification, but did not research the law or investigate the facts contained therein. Id. at 22-24. Rooney then conducted the ex parte hearing before Judge Nealon in the Judge's chambers. Id. at 26. Neither Burke nor Nallin were present for the hearing. Id.

After the Order had been signed, Rooney and Burke (but not Nallin) took it to the U.S. Marshal's office and accompanied the Marshals to Egervary's residence. Burke drove Rooney to the public road outside Egervary's residence, but did not leave the car. See Burke Interrogatories (Nallin's Ex. F) ¶ 18. The Marshals retrieved Oscar from the home and turned him over to Rooney, who was waiting at the end of the driveway. Rooney then immediately returned Oscar to his mother in Hungary.

DISCUSSION

A. Standard for Summary Judgment

Rule 56 empowers a court to enter summary judgment if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. at 249. In considering a motion for summary judgment, "all inferences to be drawn from the evidence . . . must be viewed in the light most favorable to the party opposing the motion." Todaro v. Bowman, 872 F.2d 43, 46 (3d Cir. 1989). Because I asked the parties to brief the question of whether summary judgment against the defendants is appropriate, they will be treated

as the nonmoving parties and any inferences drawn from the evidence will be viewed in the light most favorable to them.

B. State Action

Defendants first argue that summary judgment should not be entered against them because they were not federal agents. I hold that defendants Rooney and Burke were federal agents, but defendant Nallin was not.

In Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971), the Supreme Court recognized a cause of action in tort against "federal agents" acting "under color of authority" for damages that arise out of the agent's "unconstitutional conduct." See also Butz v. Economou, 478 U.S. 478, 504 (1978) ("[T]he decision in Bivens established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official."). Bivens actions are analogous to suits under 42 U.S.C. § 1983 against state officials who violate federal constitutional or statutory rights. Although the two bodies of law are not "precisely parallel," there is a "general trend" to incorporate section 1983 law into Bivens suits. See Chin v. Bowen, 833 F.2d 21, 24 (2d Cir. 1987), quoting Ellis v. Blum, 643 F.2d 68, 84 (2d Cir. 1981).

In Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982), the Supreme Court established a two-step inquiry to determine when conduct satisfies the state action requirement in

section 1983 suits:[3]

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted togther with or obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937.

In other words, action by a private party pursuant to a statute, without "something more," is not sufficient to establish state action. Id. at 939. The "something more" will vary with the circumstances of each case, but may be judged by a number of different tests, including the "public function" test, the "state compulsion" test, the "nexus" test, and the "joint action" test. Id. The Court also acknowledged that these distinct tests could be viewed as "different ways of characterizing [a] necessarily fact-bound inquiry." Id. "Only by sifting the facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Id., quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

1. The Jordan Test of State Action

The Court of Appeals applied Lugar in Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994), and held that a group of attorneys who used the Pennsylvania confession of judgment procedure[4] to have a judgment entered and executed against opposing

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[3] Section 1983's statutory requirement of action "under color of state law" is identical to the state action requirement under federal constitutional law. See Lugar, 457 U.S. at 929. Therefore, the Lugar analysis also applies to Bivens suits.

[4] As the Court of Appeals explained: "Pennsylvania law authorizes a prothonotary of any of its courts of common pleas to enter judgment by confession when a plaintiff files a complaint

parties were state actors for the purposes of a section 1983 suit. The Jordan Court drew a sharp distinction between the entry of a confessed judgment and execution on that judgment. It found that "a state procedure permitting private parties to file a complaint and confess a judgment essentially involves acquiescence by the state, not compulsion," and therefore does not constitute state action. Id. at 1266. However, that essential character changes once the confessed judgment is executed. Actions taken pursuant to execution "plainly involve or threaten the use of legal force," and therefore can be fairly attributed to the state. Id. at 1267.

The Jordan Court also specifically rejected the argument that attorneys for private parties cannot be held liable in section 1983 suits because they are officers of the court:

> The Attorneys argue, however, that they cannot be treated as persons acting under color of law because they were officers of the court representing their clients . . . The principle that a private attorney does not become a state actor by virtue of being an officer of the court is not applicable to an attorney who invokes a state attachment procedure to seize property on behalf of a client. An attorney in these circumstances may be liable under § 1983. In such situations, the attorney acts in a capacity wholly distinct from any duty owed to the court.

Id. (emphasis added).

There is a close analogy between Jordan and this case. In both, attorneys for private parties invoked court procedures to secure the aid of law enforcement officials to retrieve something of value for their clients and violated the procedural due process rights of opposing parties along the way. In fact, this case is more egregious than Jordan in two respects. First,

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that includes an original or a verified copy of an instrument the defendant has signed authorizing judgment by confession, and an actual confession of judgment signed by any attorney acting for the defendant." Jordan, 20 F.3d at 1262. The remedy for relief from a confessed judgment is a petition to strike and/or open the judgment. Id. The confession of judgment procedure therefore allows a party to contractually waive its right to pre-judgment process, but guarantees the party an opportunity for post-judgment relief. Confessions of judgment are common in commercial real estate disputes, such as that in Jordan.

unlike the post-judgment relief that was available under the confession of judgment procedure in Jordan, in this case postdeprivation relief was impossible because Egervary's son was immediately removed from the jurisdiction. See Egervary I, 80 F. Supp.2d at 502 n.7. Second, unlikeJordan where the opposing parties were deprived of property, in this case plaintiff was deprived of his fundamental liberty interest in the custody of his child. Id. at 498-99.

However, it is also clear from Jordan that merely arguing for and obtaining a court order does not convert an attorney into an agent of the state. Rather, an attorney becomes a state actor only at the point where he "sets in motion" the execution of that order. Jordan, 20 F.3d at 1266. Applying these principles, I conclude that Nallin was not a state actor, but Rooney and Burke were.

Nallin did not participate in executing the Order. He left the courthouse on that morning not knowing whether the petition had been granted. Nallin Dep. at 53-55. Nor did he accompany Rooney and Burke to the Marshal's office or Egervary's residence. Id. Therefore, Nallin did nothing to set in motion the execution of the Order and cannot be considered a federal agent under the Jordan test.[5]

However, Rooney and Burke took further steps that rendered them state actors. After obtaining the Order, they went to the U.S. Marshal's Office and drove to the Egervary residence with the Marshals and the State Police. See Rooney Interrogatories ¶ 16; Burke Interrogatories ¶ 18. While Burke remained in the car on the public road outside of Egervary's residence, Rooney received the child from the law enforcement officials and then immediately transported him back

[5] Plaintiff concedes this point. See Plaintiff's Mem. at 10. However, plaintiff argues that Nallin cannot nonetheless be considered a federal agent under the nexus test. That argument is addressed infra at B-2.

to Hungary. See Burke Interrogatories ¶ 18; Mem. of Rooney and Burke at 2. Despite these facts, Rooney and Burke argue that they were not involved in the execution of the Order. Id. ("There is no evidence of record that either attorney was involved in the execution of the order other than to receive the child and to transport him to his mother in Hungary."). This argument fails for two reasons.

First, Rooney and Burke's actions were greater than the conduct that rendered the Jordan attorneys state actors. In Jordan, the attorneys "set in motion" the execution of the judgment by taking "action that caused the Sheriff of Philadelphia to execute on the judgment by garnishing [the opposing party's] bank account." Id. at 1255, 1226. Jordan would therefore support the conclusion that Rooney and Burke were state actors even if they had merely delivered the Order to the U.S. Marshals and then walked away, but obviously they did much more.

Second, in judging whether or not Rooney and Burke participated in execution of the May 13th Order, it is important to look at the actual text of that Order. It ordered "[a]ny peace officer within the Commonwealth of Pennsylvania" to "take into protective custody Oscar Jonathan Egervary and deliver him to Petitioner's agent for immediate return to the physical custody of Petitioner." See Order of Judge Nealon dated May 13, 1994 (emphasis added). Rooney and Burke therefore cannot draw a distinction between the seizure of the child on the one hand and the delivery and return of the child on the other. All three actions (i.e., seizure, delivery, and return) are part of the May 13th Order, and Rooney and Burke participated in at least two of the three.

I therefore conclude that Rooney and Burke were federal agents under the Jordan test of state action.

2. The Nexus Test of State Action

Plaintiff concedes that defendant Nallin cannot be considered a state actor under the Jordan test, but argues that Nallin can be deemed a state actor under the nexus test. See Plaintiff's Mem. at 10. I disagree.

Plaintiff correctly points out that in Lugar the Supreme Court left open the possibility that the nexus test can supply the "something more" that establishes state action when a private party acts pursuant to a statute. See Lugar, 457 U.S. at 939. Plaintiff also correctly points out that subsequent to Lugar courts of other Circuits have applied that test. See, e.g., Chan v. City of New York, 1 F.3d 96, 106 (2d Cir. 1993); Haavistola v. Community Fire Co. of Rising Sun, 6 F.3d 211, 215 (4th Cir. 1993).[6] However, Nallin's actions do not satisfy this test.

Under the nexus test, a private decision can constitute state action when the state has "provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 546 (1987), quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1981). Plaintiff points to two items that supposedly show such encouragement from the federal government.

First, plaintiff points to the Hague Convention itself, which obviously contemplates a significant degree of participation by the "Central Authority" of the "Contracting State" in any judicial proceedings taken in furtherance of the treaty. See Hague Convention, Article 7.

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[6] I nonetheless doubt the viability of the nexus test in this Circuit. I believe the best reading of Jordan is that the Court of Appeals eschewed the specific tests of state action enumerated in Lugar and instead looked to the fact-bound "weighing of the circumstances" standard. See Jordan, 20 F.3d at 1265-66, discussing Lugar, 457 U.S. at 939. However, since Nallin's actions do not pass the nexus test, I need not consider its status in this Circuit.

However, considering the Hague Convention itself to be significant encouragement would be a form of "double counting." Lugar stands for the proposition that action taken by a private party pursuant to a statute, without "something more," is not sufficient to establish state action. Lugar, 457 U.S. at 939. Here, the Hague Convention is not "something more"; rather it is the operative law that defendants acted pursuant to and to which "something more" must be added in order for defendants to be considered state actors.

Second, plaintiff points to Rooney's contact with the U.S. State Department. It is clear that Young and Schuler of the State Department provided Rooney with significant encouragement to get involved in this case; however, it is also clear that Nallin never saw the letters from the State Department or had any contact with Young or Schuler. See Nallin Dep. at 44, 82-83. Accordingly, Rooney's contact with the State Department should not be imputed to Nallin for the purposes of determining state action.

I therefore find that defendant Nallin was not a federal agent and I will enter summary judgment in his favor on the Bivens count.[7]

C. Good Faith Defense

Defendants next argue that summary judgment should not be entered against them

[7] In his brief, Nallin repeatedly requests that summary judgment be entered in his favor on the Bivens count. Plaintiff replies that entry of summary judgment in Nallin's favor is inappropriate because "[presently] before the Court is, in essence, a counter-motion for partial summary judgment in favor of plaintiff." See Plaintiff's Mem. at 2 n.1. However, it is clear that plaintiff was on notice that Nallin was seeking summary judgment and had the opportunity to marshal the facts so as create a material dispute. See Otis Elevator Co. v. George Washington Hotel Corp., 27 F.3d 903, 910 (3d Cir. 1994). Therefore, it is appropriate for me to enter summary judgment in Nallin's favor.

because they are entitled to an affirmative defense of good faith.

The foundation for the good faith defense lies in Lugar where the Court expressed "concern[for] private individuals who innocently make use of seemingly valid state laws [that are] subsequently held to be unconstitutional." Lugar, 457 U.S. at 942 n.23. The Court observed that such concerns would best be alleviated by creating a good faith defense, but it declined to rule definitively on the availability of such a defense. Id. See also Wyatt v. Cole, 504 U.S. 158, 169 (1992) (holding that private defendants facing § 1983 liability for invoking state replevin, garnishment, or attachment statutes are not entitled to qualified immunity, but refusing to "foreclose the possibility" that such defendants "could be entitled to an affirmative defense based on good faith"). In Jordan, however, the Court of Appeals ruled that such defendants are entitled to a defense of subjective good faith.[8] Jordan, 20 F.3d at 1277. However, the Jordan Court did not define the exact contours of that defense and mentioned at least three possible standards for judging defendants' good faith: recklessness, gross negligence, and gross indifference to plaintiff's rights. Id. at 1278.

It is clear that questions such as recklessness and negligence are generally reserved for the jury. In some circumstances a party may be deemed to have acted recklessly or grossly negligent as a matter of law; however, I am unable to make such a determination on the present record. The depositions of Rooney and Burke and other witnesses have yet to be taken and there is no evidence from which to determine many of the questions that will ultimately speak to defendants'

[8] Plaintiff argues that Jordan's recognition of the good faith defense was implicitly overruled by Richardson v. McKnight, 521 U.S. 399 (1997). I disagree. Richardson addresses the contours of the qualified immunity defense, but does not address the good faith defense at all. Nor does it support plaintiff's contention that defendants in this case are limited to the qualified immunity defense.

good faith or bad faith. For example, did Rooney rely on the State Department's representation that an ICARA proceeding can be held without notice or the opportunity to be heard? If so, was such reliance reasonable?

I therefore conclude that: 1) defendants will be entitled to assert a good faith defense at trial; and 2) the question of whether that defense fails as a matter of law is best determined at that time.

D. Partial Summary Judgment

Plaintiff argues in the alternative that if summary judgment on the issue of liability is not appropriate at this time I should nonetheless enter partial summary judgment on the issues decided thus far in his favor.

However, it is unclear whether this form of partial summary judgment is proper under Rule 56. Plaintiff relies on Rule 56(a)'s provision that a party may move for summary judgment "upon all or any part" of a claim. However, this language should be read in conjunction with Rule 56(c)'s provision that "summary judgment . . . may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." Because Rule 56(c) refers to partial summary judgment on the issue of liability, but not on the individual elements that form the basis of a finding of liability, it arguably implies that a court cannot enter summary judgment on "less than" the question of liability. Further complicating this question is Rule 56(d), which provides that if a motion for summary judgment does not fully resolve a claim, a court may:

ascertain what material facts exist without substantial controversy and what

> material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

See Fed. R. Civ. P. 56(d).

Cases and commentators are split on the interplay among these three provisions and the circumstances under which partial summary judgment is appropriate. See Advanced Semiconductor Materials Am., Inc. v. Applied Materials, Inc., No. C-93-20853, 1995 WL 419747, at *2-3 (N.D. Cal. July 10, 1995) (discussing the split and citing cases). However, I need not weigh-in on this debate because it is agreed that a court has discretion to decline to enter partial summary judgment if it would not "materially expedite the adjudication." 10B Wright, Miller & Kane, Federal Practice and Procedure § 2737 (3d ed. 1998). That is the case here. The evidence establishing the violation of plaintiff's due process and rights and defendants' status as state actors is interwoven with the evidence of good faith and/or bad faith. Therefore, partial summary judgment will not shorten the presentation of evidence at trial and will accordingly be denied.

An appropriate Order follows.

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	:	

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:

O R D E R

AND NOW this day of August, 2000, for the reasons contained in the accompanying Memorandum, it is hereby ORDERED that summary judgment is entered in favor of defendant Nallin and against plaintiff Egervary on Count I (Bivens). It is further ORDERED that:

1. The parties shall complete discovery within 120 days of this Order;
2. Defendant Nallin shall file any dispositive motion regarding Count II (conspiracy) fourteen days after the close of discovery and plaintiff shall reply fourteen days thereafter.

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THOMAS N. O'NEILL, JR., J.